Supreme Court, U.S.
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No. 09-

IN THE
Supreme Court of the United States

ALLIANCE SHIPPERS, INC.,

Petitioner,

v.

PENOBSCOT FROZEN FOODS, INC., FREDERICK D. STARRETT, III, individually and as an agent of PENOBSCOTT FROZEN FOODS, INC. AMERICOLD LOGISTICS, L.L.C., ASSOCIATED GROCERS, INC., ASSOCIATED WHOLESALE GROCERS, INC., BRUNO'S SUPERMARKETS, INC., CHENEY BROTHERS, INC., GORDON FOOD PRODUCTS CORP., McLANE COMPANY, INC., PIGGLY-WIGGLY CO., WINN-DIXIE STORES, INC., PENOBSCOT McCRUM, L.L.C., and COUNTY SUPER SPUDS, INC.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a freight transportation company's claim for unpaid freight transportation governed by federal law?

2. Is the federal statutory right of a federally regulated freight transportation company protected from being vitiated by the application of state common law governing the integrity of the corporate form itself? Stated another way, should federal common law apply to determine whether a corporate successor is liable for interstate freight transportation?

CORPORATE DISCLOSURE STATEMENT

Alliance Shippers, Inc. does not have a parent corporation nor owns 10% or more of any publicly held company.

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OPINIONS AND ORDERS BELOW

In July, 2004, Petitioner/Plaintiff, Alliance Shippers, Inc. ("Alliance"), a freight transportation company, instituted an action in the Superior Court of New Jersey, Law Division, against its customer/shipper, Penobscot Frozen Foods, Inc. ("Penobscot"), Penobscot's successor, Penobscot McCrum, LLC ("McCrum"), and several consignees (*i.e.*, Penobscot's customers), entitled *Alliance Shippers, Inc. v. Penobscot Frozen Foods, et al.*, Docket No. MID-L-4374-04. McCrum removed this action to the U.S. District Court for the District of New Jersey on grounds that the Court had subject matter jurisdiction over Alliance's claims. The entire case was thereafter remanded *sua sponte* to the State Court.[1] 33a, 35a.

Alliance petitions this Court for a writ of certiorari of the February 2, 2009 decision of the New Jersey Superior Court, Appellate Division, Docket No A-4441-06T5 (1a), affirming the October 6, 2006 oral decision of the Hon. Alexander P. Waugh, Jr. (New Jersey Superior Court, Law Division) granting McCrum's motion for partial summary judgment on successor liability under Docket No. MID-L-4374-04. 27a. An order in accordance with Judge Waugh's decision was filed on November 1, 2006. 24a.

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1. While the case was in the District Court, Alliance settled with the consignees, save for one which filed for bankruptcy. Alliance also obtained a default judgment against Penobscot, which thereafter filed a Chapter 7 Bankruptcy Petition.

On September 11, 2009, the New Jersey Supreme Court denied Alliance's petition for certification under Docket No. C-36, September Term 2009, 63,982. (45a).

All of the above orders and decisions were unreported.

JURISDICTION

As stated above, on October 6, 2006, the Hon. Alexander P. Waugh, Jr. (New Jersey Superior Court, Law Division) granted McCrum's motion for partial summary judgment on successor liability under Docket No. MID-L-4374-04. 24a. An order in accordance with the decision was entered on November 1, 2006. 27a. On February 2, 2009, the New Jersey Superior Court, Appellate Division, Docket No A-4441-06T5 (1a) filed an opinion affirming Judge Waugh's order and decision. On September 11, 2009, the New Jersey Supreme Court, denied Alliance's petition for certification under Docket No. C-36, September Term 2009, 63,982. (45a). Therefore, this matter gives rise to a federal question pursuant to 28 *U.S.C.* §§ 1331 and 1337 and this Court has jurisdiction under 28 *U.S.C.* § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Alliance's primary claim in this case is exclusively governed by 49 *U.S.C.* § 14706, the Interstate Commerce Termination Act ("ICTA"), and also involves: 49 *U.S.C.* §§ 13706, 13708, § 13709, 10101, 11102, 13101(A)(1)(C), 13102(13), 13701, 13706, 13708, 13709, 14101(b)(2), and 14706.

STATEMENT OF THE CASE

The Orders of the New Jersey Superior Court, left undisturbed by the New Jersey Supreme Court, did not apply federal common law when granting summary judgment on the successor liability of defendant, McCrum. Instead, Maine law was applied. Consequently, Alliance's federal statutory right it originally had against Penobscot, which continued against McCrum, was vitiated. The Orders left Alliance without a meaningful remedy and is inconsistent with and contrary to important policies of Congress when enacting ICTA.[2]

Alliance is a New Jersey-based freight transportation company regulated by ICTA and regulations promulgated thereunder. See Legal Argument, Point I, *infra*. Alliance arranged for the transportation of Penobscot's potato products from Maine to various destinations throughout the country. Most of the individual bills of lading, issued by Penobscot, contained multi-stop deliveries to different consignees and exceeded the sum of $10,000. At the same time, and unbeknownst to Alliance, Penobscot was failing financially and its assets were being foreclosed and sold by its secured lender, Key Bank (the "bank"). 3a-4a.

Penobscot's major potato supplier, County Super Spuds, Inc. ("County"), engaged in substantial negotiations with the bank to either acquire the bank's liens or enter into an auction bid agreement. 3a-4a.

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2. Alliance's other claims against McCrum, under the equitable doctrines of quantum merit and unjust enrichment, were partially successful below. These claims are not part of this Petition.

The bank's lien on Penobscot's personalty was subject to substantial super-priority liens (ahead of the bank) held by potato suppliers under the Federal Perishable Commodities Agricultural Act, 7 *U.S.C.* 499e *et seq.* (the "PACA liens"). The PACA liens did not attach to Penobscot's realty, which included desirable waterfront acreage along the Penobscot River in re-gentrified Belfast, Maine. Hence, a forced sale of Penobscot's realty would be free and clear of PACA liens. On the other hand, a forced sale of Penobscot's personalty and the proceeds thereof would be subject to and encumbered by the PACA liens.

The bank scheduled a public auction for April 29, 2004. Shortly before, County threatened the bank that County would stop supplying Penobscot with potatoes and potentially cause the shut-down of Penobscot's operations, unless County's purchase offer was accepted by the bank. Conversely, the bank threatened County with canceling the auction[3] and selling Penobscot's realty separately from the personalty, unless the bank's counter-offer was accepted.

On the eve of the auction, the bank and County entered into a secret bid agreement requiring County to bid a certain amount and, if successful, to pay certain debts of Penobscot. The auctions were conducted without *disclosure* of the bid agreement. County was the only *bona fide* bidder and it assigned its successful bid to its alter-ego, McCrum. 3a-4a.

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3. Two separate auctions were held because Penobscot's reality was located in two separate towns.

Amongst the assets acquired by McCrum were the accounts receivables. 4a. Many of Penobscot's unpaid invoices related to products delivered by Alliance. 4a-5a, 11a. Penobscot's custom and practice was to add Alliance's freight charges to the price of the products and combine the total as one amount in the invoice. In effect, Penobscot "passed through" its freight costs to its customers. When Penobscot's customers made their own transportation arrangements, no "pass-throughs" occurred. 5a, 11a.

Four (4) significant events occurred after the auction. First, McCrum continued the Penobscot business, uninterrupted, at the same facilities and with the same employees, products, customers and vendors, etc. Second, McCrum paid debts of Penobscot substantially beyond its obligations under the secret bid agreement. Third, McCrum collected on all outstanding Penobscot invoices, which included Alliance's unpaid freight transportation charges. Fourth, Alliance, unaware of the McCrum acquisition, continued rendering freight transportation services, until McCrum belatedly advised Alliance that McCrum would not pay Alliance for any pre-auction dated invoices. 4a-5a, 11a.

McCrum and Alliance moved and cross-moved for summary judgment. On the claim of successor liability against McCrum for Penobscot's non-payment of freight charges (totaling approximately $265,000), the trial court applied Maine law and granted summary judgment to McCrum. 27a-32a. Other rulings, including subsequent trial Court rulings, have no bearing on this petition.

At the crux of this Petition is Alliance's contention that it's interstate freight charge claim is subject to federal statutes and regulations. Thus, federal common law should apply to successor liability. These issues were raised early in this litigation before it was remanded from federal court to state court. They were also raised in Alliance's initial brief and during oral argument at the summary judgment motion stage. The state trial court did not grasp the importance of these issues and instead focused on engaging in a traditional choice of law analysis of the bank's foreclosure sale and the secret bid agreement without due consideration of the federal statutory claim involved the application of federal common law. 6a, 16a-17a.

The opinion of the Superior Court, Appellate Division, contained the same fallacies. 16a-17a. The New Jersey Supreme Court, like this Court, not a Court of correction, did not find a significant question of public importance, *N.J. Court Rule* 2:12-5, and denied Alliance's petition for certification.

REASONS FOR GRANTING THE PETITION

This case presents two exceptionally important questions: (1) Is a freight transportation company's claim for unpaid freight transportation still governed by federal law and, if so: (2) Should a state court apply federal common law regarding corporate successor liability for the federal claim of unpaid freight transportation under ICTA?

This Court should grant certiorari to resolve these questions and dispositively deal with the inconsistencies

that presently exist in various federal district court decisions. *S. Ct. R.* 10(c). Indeed, no Circuit has specifically addressed the first question. However, Circuit decisions addressing successor liability have applied federal common law to determine liability for federal claims. These questions are of paramount importance to Congress' vision and intent that the transportation policies in the United States encourage sound economic conditions. 49 *U.S.C.* 13101(a)(1)(c).

With respect to the first issue, in a recent unpublished opinion, the Sixth Circuit has stated that a claim for freight charges due and owing for goods transported across state lines is subject to federal jurisdiction under 49 *U.S.C.* § 13501(c). *CGH Transport, Inc. v. QuebecCor World, Inc.*, 261 *Fed Appx.* 817, 821 (6th Cir. 2008).

Notwithstanding *CGH*, *infra*, there is conflicting authority from the district courts as to whether *Thurston Motor Lines, Inc. v. Jordan K. Rand, LTD.*, 460 *U.S.* 533, 103 *S.Ct.* 1343, 75 *L.Ed.2d* 260 (1983), which held federal question jurisdiction existed over a carrier's "simple contract-collection action," remains applicable after the transportation industry was deregulated pursuant to ICTA. *Compare Old Dominion Freight Line v. Allou Distributors, Inc.*, 86 *F.Supp.2d* 92 (E.D.N.Y. 2000)(holding carrier's action for freight charges allegedly owed for interstate transportation services brought pursuant to 28 *U.S.C.* Sec. 1337(a) provided the basis for the district court to exercise original jurisdiction); *Artic Express, Inc. v. Del Monte Fresh Produce NA, Inc*, 366 *B.R.* 786 (S.D. Ohio 2007)(holding that a shipper's statute of limitations

defense under ICTA to a carrier's collection claim creates federal subject matter jurisdiction); *with Transit Homes of America v. Homes of Legend, Inc.*, 173 *F. Supp.*2d 1185 (N.D. Ala. 2001)(holding Carmack Amendment to ICTA, 49 *U.S.C.* § 14706, provides a federal cause of action against carriers but does not provide federal subject matter jurisdiction for freight charge claim under contract); *Central Transport Int'l v. Stirling Seating, Inc.*, 356 *F. Supp.* 2d 786 (E.D. Mich. 2005)(same).

The District Court below in this case, relying upon *Central Transport*, ordered a remand to the New Jersey Superior Court. 33a, 35a.

However, the underlying fundamental federal policy of ICTA is to create certainty fostering an environment of sound economic conditions among carriers. 49 *U.S.C.* 13101(a)(1)(C). State common law, as to corporate successor liability, should be preempted by federal common law, discussed *infra*. Successor liability under federal common law is not surprisingly consistent with the law established in a majority of states (including New Jersey). *Louisiana Pacific Corp. v. Asarco*, 909 *F.*2d. 1260, 1263-1264 (9th Cir. 1990). Thus, federal common law applies where federal rights and remedies are at stake. *Id.*

The "Traditional Rule of Successor Liability" is invoked where the purchasing corporation is a continuation of the selling corporation. *Cf. Louisiana Pacific Corp. v. Asarco, supra*, 909 *F.2d* at 1263-1264 *with* the New Jersey Appellate Division opinion below at 15a-16a (citing *Jackson v. N.J. Mfrs. Ins. Co.*, 407

*A.*2d 1204 (N.J. App. Div. 1979). Application of federal common law would have resulted in McCrum being found liable for Penobscot's debts due and owing to Alliance.

This traditional rule is contrasted with Maine common law as stated by the New Jersey Appellate Division at 16a (citing *Div. of Bureau of Labor Stds. v. Diamond Brands, Inc.* 588 *A.2d* 734 (Me 1999), which requires the absence of a *bona fide* arms-length transaction to find liability against a corporate successor. Improper application of Maine law by the New Jersey State courts below left Alliance without recovery for its federal statutory claim.

The petition should be granted to prevent the improvident application of state common law, as opposed to federal common law, regarding corporate successor liability when important fundamental federal policies are involved. Specifically, a broad application of the lower courts' decisions will unduly interfere with the Congressional Policy of maintaining sound economic conditions among carriers providing interstate transportation services throughout the United States. This is essential in order to foster a strong national economy. 49 U.S.C. 13101(a)(1)(C).

LEGAL ARGUMENT

POINT I

THIS CONTROVERSY IS GOVERNED BY FEDERAL LAW RAISING FEDERAL QUESTIONS PURSUANT TO 28 *U.S.C.* §§1331 AND 1337 BECAUSE THIS MATTER "ARISES UNDER" THE CONSTITUTION, LAWS, OR TREATIES OF THE UNITED STATES, FOR INTERSTATE FREIGHT TRANSPORTATION

This controversy presents questions over which this Court has original jurisdiction under 28 *U.S.C.* §§1331 and 1337. Therefore, this matter "arises under" the Constitution, laws, or treaties of the United States. Specifically, the Complaint alleges, among other things, a dispute over "interstate commerce". It is indisputable that the complaint concerned interstate freight transportation services.

Since a motor carrier, freight forwarder and freight broker are licensed by the federal government, Alliance's "motor transportation" and its "charges" and "services" are exclusively governed by an Act of Congress, the Interstate Commerce Commission Termination Act of 1995, P.L. 104-88 ("ICTA"). Stated differently, since this action against Penobscot was a suit of a civil nature relating to "charges" for "motor transportation services" by a common carrier in interstate commerce, it is governed by the Interstate Commerce Act, 49 *U.S.C.* §§ 11102 and as amended by the ICC Termination Act of 1995 *P.L.* 104-88. This

provides the basis for subject matter jurisdiction pursuant to the "arising under" jurisdictional provisions of 28 *U.S.C.* §§ 1331 and 1337 as Acts of Congress regulating commerce.

In addition, most of the individual bills of lading issued by Penobscot exceeded the sum of $10,000. Thus, the federal court had original jurisdiction over this lawsuit pursuant to 28 *U.S.C.* 1337.

Federal law, specifically 49 *U.S.C.* §§ 13701, 13706, 13708 and 13709, also governs liability for payment of transportation freight rates, billing disputes and procedures for resolving claims for transportation freight charges. For example, 49, *U.S.C.* §§ 13701, entitled, "requirements for reasonable rates, classifications, through routes, rules, and practices for certain transportation," governs rates "charge[d]" for "motor transportation services" as alleged in the Complaint. Further, 49 *U.S.C.* § 13706, entitled "Liability For Payment of Rates," sets forth the Federal law and standards regulating the payment of freight charges. This is the subject of the Complaint. Moreover, 49 *U.S.C.* § 13708, entitled "billing and collection practices," regulates and governs Alliance's right to the freight charges that are the subject of the Complaint. Finally, 49 *U.S.C.* § 13709, entitled "Procedures For Resolving Claims Involving Unfilled, Negotiated Transportation Rates," is the federal law providing the procedure for addressing Alliance's allegations for freight charges due for motor carrier services as alleged in the Complaint.

This action solely involves unpaid freight transportation charges for interstate shipments. As set

forth above, ICTA is the governing statutory scheme for interstate freight transportation. ICTA provides that the **exclusive** remedy for a breach of contract with shippers by stating ". . . shall be an action in an appropriate state court or United States District Court, unless the parties otherwise agree." 49 *U.S.C.* 14101(b)(2). An "individual shipper" is any person who "owns the goods being transported[.]" 49 *U.S.C.* 13102(13). This would include Penobscot and McCrum, which purchased all of Penobscot's assets and collected on the latter's invoices, which included Alliance's unpaid freight charges. 4a-5a, 11a. Indeed, McCrum's own Notice of Removal was premised on "federal question" subject matter jurisdiction.

The public policy underlying ICTA states in pertinent part:

> Sec. 13101. Transportation policy
>
> (a) In General. — To ensure the development, coordination, and preservation of a transportation system that meets the transportation needs of the United States, including the United States Postal Service and national defense, it is the policy of the United States Government to oversee the modes of transportation and — (1) in overseeing those modes —
>
> . . .

> **(C) to encourage sound economic conditions in transportation, including sound economic conditions among carriers;**

49 *U.S.C.* 13101(a)(1)(C). (emphasis added) Uniformity of the law governing interstate transportation should require that federal law, rather than the law of any particular state, be applicable to determine the liability for interstate freight charges of either the primary responsible party (i.e. the customer) or the secondary responsible party (i.e. the customer's successor).

This Court has held that in the absence of a statute, regulation, bill of lading, or a contract between the parties which provides the contrary, the shipper is primarily liable for the freight charges. *Southern Pacific Transportation Co. v. Commercial Metal Co.*, 456 *U.S.* 336, 102 *S.Ct.* 1815, 1820, 72 *L.Ed.2d.* 114 (1982). Federal obligations due and owing to freight transportation companies should not be lost or compromised simply because the shipper's (or consignee's) successor is not liable for its predecessor's debts under state common law.

The Interstate Commerce Act, 49 *U.S.C.* §§ 10101, *et seq.* and 49 *U.S.C.* § 11102 and as amended by the ICC Termination Act of 1995 *P.L.* 104-88, as well as other applicable federal law, including but not limited to 49 *U.S.C.* §§ 13701, 13706, 13708 and 13709, all provide one uniform system and regime to govern liability for "charges" for "motor transportation services" of goods in interstate commerce.

Federal Law governs the rights, duties and obligations of the parties relative to the allegations in the Complaint. This matter, therefore, is one that gives rise to federal questions and is subject to federal subject matter jurisdiction under 28 *U.S.C.* §§ 1331 and 1337.

In accordance with this reasoning, the Seventh Circuit recognized:

> Hence this branch of interstate commerce was being subjected to such a diversity of legislative and judicial holdings ***that it was practically impossible for*** a shipper engaged in a business that extended beyond the confines of his own state, or ***a carrier whose lines were extensive, to know***, without considerable investigation and trouble, and even then oftentimes with but little certainty, ***what would be the carrier's actual responsibility as to goods delivered to it for transportation from one state to another.*** [citing Adams Express Co. v. Croninger, 226 U.S. 491, 506, 33 S.Ct. 148, 152, 57 L.Ed. 314 (1913)]. The Court recognized that the Carmack Amendment manifested Congress's intent "to take possession of the subject" and to prescribe uniform rules governing liability of carriers to shippers regarding interstate shipments. Id. at 506, 33 S.Ct. at 152.

North American Van Lines, Inc. v. Pinkerton Sec. Systems, Inc., 89 *F.3d* 452 (7th Cir. 1996)(emphasis added). Likewise, in *Glass v. Crimmins Transfer Co.*,

299 *F. Supp.2d* 878 (C.D. Ill. 2004), the District Court noted:

> . . . The underlying principle [of the Carmack Amendment] is that ***the carrier is entitled to base rates upon value and that its compensation should bear a reasonable relation to the risk and responsibility assumed.*** The broad purpose of the federal act is to compel the establishment of reasonable rates and to provide for their *uniform* application.
>
> Preceding these cases, the Supreme Court had held consistently that federal law excludes all other rights and remedies with respect to interstate transportation agreements, *e.g.*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 *U.S.* 533, 535, 103 *S.Ct.* 1343, 75 *L.Ed.2d* 260 (1983), and that a carrier's rights and obligations, as defined by its published tariff, cannot be enlarged by any alleged tort of the carrier. *Maislin Indus. U.S. Inc. v. Primary Steel, Inc.*, 497 *U.S.* 116, 126, 110 *S.Ct.* 2759, 111 *L.Ed.2d* 94 (1990).
>
> . . .
>
> The purpose of this statute is to establish *uniform* federal guidelines designed in part to remove the uncertainty surrounding a carrier's liability when damage occurs to a shipper's interstate shipment. To permit a shipper to choose among various types of

> remedies would cause confusion and insurmountable problems and defeat the Act's purpose of eliminating uncertainty as to a carrier's liability by injecting uncertainty back into this area of transportation Congress has sought to regulate.

Id. At 885 (emphasis added).

Similarly, the same uniform approach should apply when seeking to recover monies due and owing for freight transported interstate. Notwithstanding this seemingly sensible approach, there appears to be only one Circuit that has confirmed, in *dictum*, that this approach is proper. However, there is a split of authority among a few District Courts as to whether such a claim is governed by federal law.

The Sixth Circuit and a few District Courts have held that federal jurisdiction exists under 49 *U.S.C.* 13501 with respect to a carrier's claim that goods were transported across state lines. *CGH*, *supra*, 261 *Fed. App.* at 821; *Old Dominion Freight Line*, *supra*, 86 *F. Supp. 2d.* at 92-94; *Arctic Express, Inc.*, *supra*, 366 *B.R.* 786.

Other District Courts have erroneously held that even though a shipper has a federal cause of action against a carrier, a carrier does not have a reciprocal federal claim against a shipper. *Transamerica Homes of America*, *supra*, 173 *F. Supp. 2d.* 1185; *Central Transport Int'l*, *supra*, 856 *F. Supp. 2d.* 786. These cases are inconsistent with Congress' stated purpose of sound economic conditions among carriers and should not be adopted by this court.

For all of these reasons, Alliance's claim for unpaid freight charges is governed by federal law.

POINT II

FOR PURPOSES OF CORPORATE SUCCESSOR LIABILITY, UNIFORMITY OF THE LAW FOSTERING THE CONGRESSIONAL POLICY OF SOUND ECONOMIC CONDITIONS MANDATES THAT THE RIGHTS OF A FEDERALLY REGULATED FREIGHT TRANSPORTATION COMPANY SHOULD NOT BE VITIATED BY THE APPLICATION OF STATE COMMON LAW GOVERNING THE INTEGRITY OF THE CORPORATE FORM ITSELF AS DISTINGUISHED FROM STATE COMMON LAW GOVERNING THE INTERNAL AFFAIRS OF A CORPORATION

A. The Lower Court Decisions

The lower courts utilized a state common law choice of law analysis and focused on the foreclosure sale by the bank. The lower courts did not focus on the federal statutory rights of Alliance, even though it arranged for the transportation of interstate shipments. The New Jersey Superior Court, Appellate Division, stated:

> There is a conflict between the laws of New Jersey and Maine respecting the issue of successor liability. In New Jersey, the law can be summarized as follows:

> [W]here one company sells or otherwise transfers all of its assets to another company the latter is not liable for the debts and liabilities of the transferor, including those arising out of the latter's tortuous conduct, except where (1) the purchaser expressly or impliedly agrees to assume such debts and liabilities; (2) the transaction amounts to a consolidation or merger of the seller and purchaser; (3) the purchasing corporation is merely a continuance of the selling corporation, or (4) the transaction is entered into fraudulently in order to escape liability for such debts.
>
> [*Jackson v. N.J. Mfrs. Ins. Co.*, [400 A.2d 81, 84], 166 *N.J. Super.* 448, 454 (App. Div. 1979), *certif. denied*, 81 *N.J.* (1979).]

In Maine, the inquiry is simpler and generally protects the successor corporation from liability for the debts of its predecessor:

> [A]bsent a contrary agreement by the parties, or an explicit statutory provision in derogation of the established common law rule, a corporation that purchases the assets of another corporation in a *bona fide*, arm's-length transaction

> is not liable for the debts or liabilities of the transferor corporation.
>
> [*Dir. Of Bureau of Labor Stds. V. Diamond Brands, Inc.*, 588 *A.2d* 734, 736, (Me. 1991).]
>
> We agree with Judge Waugh that the analysis must properly focus on the foreclosure sale and not on the contract between Alliance and Penobscot.

15a-16a.

As a result, Maine common law was applied. This application resulted in the evisceration of Alliance's federal rights under ICTA against Penobscot and McCrum. Alliance could not collect from Penobscot because it was bankrupt. It was not permitted to recover from McCrum as Penobscot's successor under Maine common law.

For purposes of this Petition, Alliance does not challenge the lower courts' choice of law analysis between Maine and New Jersey common law.[4] Rather, the issue before this Court is whether federal common law on successor liability should have been applied. As explained below, *see* Point II. B. *infra*, federal common law is very similar to the New Jersey law, stated above, and, not surprisingly is also similar to the law in the majority of states.

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4. Alliance also does not challenge the lower court's finding of fact that the sale of the corporation was an arm's length transaction.

B. Federal Rights Preempt State Corporate Law When It Involves the Integrity of the Corporation and Liability to Third Parties

This Court has addressed the issue of when a federal right can be impacted by state corporate law. The critical distinction in these cases depends upon whether the state law is governing the internal affairs of the corporation or whether state law is defining the integrity of the corporation.

In *Burks v. Lasker*, 441 U.S. 471, 99 S. Ct. 1831, 60 L.Ed.2d 404 (1979), this Court was confronted with a shareholders' federal statutory claim. It held the business judgment of the Board of Directors (under state common law) defeated the federal claim. Significantly, *Burks* reasoned as follows:

> Legal rules which impact significantly upon the effectuation of federal rights must, therefore, be treated as raising federal questions. . . . [citing cases] . . . Thus, "the overriding federal law applicable here would, where the facts required, control the appropriateness of redress despite the provisions of state corporation law . . . ." *J. I. Case Co. v. Borak*, *supra*, 377 *U.S.*, at 434, 84 *S.Ct.*, at 1561 (emphasis added).
>
> The fact that "the scope of [respondents'] federal right is, of course, a federal question" does not, however, make state law irrelevant. *De Sylva v. Ballentine*, 351 *U.S.* 570, 580, 76

> *S.Ct.* 974, 980, 100 *L.Ed.* 1415 (1956). . . . It is true that in certain areas we have held that federal statutes authorize the federal courts to fashion a complete body of federal law. *See Textile Workers v. Lincoln Mills*, 353 *U.S.* 448, 451, 456-457, 77 *S.Ct.* 912, 915, 917-918, 1 *L.Ed.*2d 972 (1957). Corporation law, however, is not such an area.

Id. at 477. The Supreme Court then held that the federal statutes at issue did not require that federal law displace state laws governing the powers of directors unless the state laws permit action prohibited by the Acts, or unless "their application would be inconsistent with the federal policy underlying the cause of action . . . ." *Id.* (*quoting*, *Johnson v. Railway Express Agency*, 421 *U.S.* 454, 465, 95 *S.Ct.* 1716, 1722, 44 *L.Ed.2d* 295 (1975). The *Burks* court further noted:

> Although "[a] state statute cannot be considered 'inconsistent' with federal law merely because the statute causes the plaintiff to lose the litigation," . . . , **federal courts must be ever vigilant to insure that application of state law poses "no significant threat to any identifiable federal policy or interest . . . ."** *Wallis v. Pan American Petroleum Corp.*, 384 *U.S.* 63, 68, 86 *S.Ct.* 1301, 1304, 16 *L.Ed.2d* 369 (1966). . . . [citing cases] And, of course, this means that "unreasonable," *Wallis v. Pan American Petroleum Corp.*, *supra*, at 70, 86 *S.Ct.*, at 1305, or "specific aberrant or hostile state rules," *United States v. Little Lake Misere*

> *Land Co.*, 412 *U.S.* 580, 596, 93 *S.Ct.* 2389, 2398, 37 *L.Ed.2d* 187 (1973), will not be applied. *See, e. g., Levitt v. Johnson*, 334 *F.2d* 815, 819-820 (CA1 1964). The "consistency" test guarantees that "[n]othing that the state can do will be allowed to destroy the federal right," *Board of Comm'rs v. United States*, 308 *U.S.*, at 350, 60 *S.Ct.*, at 288, and yet relieves federal courts of the necessity to fashion an entire body of federal corporate law out of whole cloth.

Id. at 479-480.

By contrast, *In re G & L Packing Co., Inc.*, 41 *B.R.* 903 (N.D. N.Y. 1984) ("G&L"), involved a federal claim against a third party to enforce the policy and language behind the Packers and Stockyards Act. This Act created a trust on livestock and related proceeds purchased by a packer for the benefit of unpaid cash sellers to disregard the formation of two separate entities on paper that were really a single integrated entity.[5]

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5. In *G&L*, defendant Marine argued numerous formal indicia proved the separate nature of Orange and G & L. It emphasizes that G & L and Orange are separately incorporated and share no common officers, directors or shareholders; that the firms are located in different cities and perform different commercial functions; that the two firms retained separate attorneys; that G & L had an accountant while Orange did not. The court held these factors are not incompatible with a finding that G & L and Orange are a single integrated enterprise. Orange was set up specifically to expand G & L's operations into the slaughtering field; its location in Dewitt was due to the fortuitous availability of facilities there. The ownership and control of the two entities were separate in name only: Franklin Giruzzi was the dominant presence in the operation of both.

The District Court distinguished *Burks* and relied heavily upon *First National City Bank v. Banco Para El Comercio*, 462 *U.S.* 611, 103 *S.Ct.* 2591, 77 *L.Ed.2d* 46 (1983). The *G & L* court noted that the statute was remedial in nature, and is designed to be construed liberally to protect unpaid suppliers of livestock from economic ruin. Thus, the *G & L* court deemed there was substantial federal interest in supplying a federal rule of decision as to whether this statute may be avoided by use of the corporate form. *Id.* at 910.

In so holding, this Court distinguished *Burks* when stating:

> However, ***a distinction must be made between state laws governing the internal affairs of corporations, and state laws defining the integrity of the corporate form itself.*** In the recently decided case *First National City Bank v. Banco Para El Comercio*, 462 *U.S.* 611, 103 *S.Ct.* 2591, 77 *L.Ed.2d* 46 (1983) a Cuban bank contended that the law of Cuba should apply in determining whether it is an instrumentality of the government, and thereby entitled to invoke sovereign immunity, or whether it is an independent corporation, and thereby subject to the claims of an American Bank. The Supreme Court declined to apply Cuban law, explaining:
>
> > As a general matter, the law of the state of incorporation normally determines issues relating to the

> ***internal affairs of a corporation.*** Application of that body of law achieves the need for certainty and predictability of result while generally protecting the justified expectations of parties with interests in the corporation. *See Restatement (Second) of Conflict of Laws* § 302, Comments a & e (1971). *Cf. Cort u Ash*, 422 *U.S.* 66, 84, 95 *S.Ct.* 2080, 2090, 45 *L.Ed.*2d 26 (1975). ***Different conflicts principles apply, however, where the rights of third parties external to the corporation are at issue.*** See *Restatement (Second) of Conflicts of Laws, supra* § 301. ***To give conclusive effect to the law of the chartering state in determining whether the separate juridical status of its instrumentality should be respected would permit the state to violate with impunity the rights of third parties under international law while effectively insulating itself from liability in foreign courts. We decline to permit such a result.***

Id., 103 *S.Ct.* at 2597. Although Banco Para El Comercio involved a choice of law question in the international rather than intersystem (state-federal) context, the principle articulated is applicable in either case. Indeed, in a footnote to the passage quoted above, the Court cited *Anderson v. Abbott*, 321 *U.S.* 349,

> 64 *S.Ct.* 531, 88 *L.Ed.* 793 (1944) for the analogous proposition that ***'no State may endow its corporate creatures with the power to place themselves above the Congress of the United States and defeat the federal policy concerning national banks which Congress has announced."*** Id. at 2597 n. 10.

Id. at 910 (emphasis added).

Similarly, ICTA is remedial in nature, and is designed to be construed liberally to protect unpaid freight transportation companies from economic ruin. Here, Congressional policy is to encourage sound economic conditions in transportation, including sound economic conditions among carriers. Unsound economic conditions in freight transportation would result if freight charges could not be recovered, under state successor liability law, when the predecessor's assets were voluntarily or involuntarily transferred to another corporation. Application of the minority view of successor liability under Maine law, would endow McCrum to place itself above Congress and defeat the federal policy concerning interstate commerce that Congress has announced, *i.e.*, sound economic conditions among carriers. Application of federal common law would, on the other hand, serve the purpose intended by Congress.

Thus, there is a substantial federal interest in applying federal common law for corporate successor liability in matters where the claims are governed exclusively by ICTA. As stated below, it is identical to

the law followed by a majority of states, including New Jersey. *Cf. Louisiana Pacific Corp. v. Asarco*, 909 *F.2d* 1260, 1263 (9th Cir. 1990) *with* the New Jersey Appellate Division decision in the matter *sub judice*. *Infra* at 15a-16a.

C. Federal Common Law Provides That A Successor Company Is Liable For The Debts Of Its Predecessor Where There Exists Sufficient Indicia Of Continuity Between The Two Companies And That The Successor Firm Had Notice Of Its Predecessor's Liability

In *Glass v. Crimmins*, 299 *F. Supp. 2d.* 878 (C.D. Ill. 2004), a Carmack claim was asserted against an alleged successor corporation.

Under these circumstances the Court applied federal common law and held:

> To hold a successor liable we must find that there exists sufficient indicia of continuity between the two companies and that the successor firm had notice of its predecessor's liability.

Id. At 889.

To prove a "continuous relationship", other courts have noted that the various factors should be considered, including but not limited to:

> (1) substantial continuity of the same business operations;

(2) use of the same plant;

(3) continuity of work force;

(4) similarity of jobs and working conditions;

(5) similarity of supervisory personnel;

(6) similarity in machinery, equipment, and production methods;

(7) similarity of products and services; and

(8) the ability of the predecessor to provide relief.

See e.g. Cobb v. Contract Transport, Inc. 452 *F.3d* 543,551 (6th Cir. 2006) and cases cited therein.

Moreover, other courts have applied federal common law when deciding whether a corporate successor was liable on a federal claim. *Id.* (applying federal common law on successor liability for claims under the Family Medical Leave Act 29 *U.SC.* § 2601-2654); *McKee v. American Transfer and Storage*, 946 *F. Supp.* 485 (N.D. Tex. 1996) (claims under Title VII and the American with Disabilities Act, 42 *U.S.C.* 12101 *et seq.*); *Louisiana Pacific Corp. v. Asarco*, 909 *F.2d* 1260 (9th Cir. 1990) (claims under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) 42 *U.S.C.* § 9607, 9613).

The federal common law on successor liability should apply for freight charge claims because it furthers the federal Congressional policy, see *Cobb*, 452 *F.3d* at 551-552, as embodied in ICTA. For reasons stated in Point I, *supra*. Alliance's claim arises under federal statutory law that regulate the interstate shipment of goods. These statutes and regulations promulgated thereunder were enacted to provide certainty and sound economic conditions among freight transportation companies.

Interstate commerce is essential to our nation's economy. Carriers can only be "economically sound" if they know they will paid for interstate transportation of goods and that such claims will not be defeated by a state common law. Therefore, federal common law, as to corporate successor liability, should have been applied herein below.

Accordingly, this Court should grant Alliance's petition for certiorari because federal common law for successor liability should be used for a federal claim for freight charges. The freight transportation industry needs uniformity when shippers (or consignees), which are liable for freight charges under federal law, voluntarily or involuntarily sell their assets. The federal policy of uniform law in the federally regulated industry of interstate freight transportation is essential to ensure a strong national economy. This policy should be advanced to provide a framework of economic certainty as Congress stated to be its purpose when enacting ICTA.

CONCLUSION

The petition for certiorari should be granted to resolve significant questions arising from the New Jersey Superior Court decisions in conflict and inconsistent with the relevant decisions of this Court and Congressional intent. Absent certification, application of state corporate successor liability law will be allowed to stand and strip federal statutory rights. Paramount importance of Congress' vision is that the transportation policy in the United States encourages sound economic conditions. This mandates that this Court grant certiorari to resolve the questions of whether freight transportation claims arise under federal law, and whether federal common law, as to successor liability, should be applied on such claims. Granting certiorari will dispositively deal with these issues. *S. Ct. R.* 10(c).

Respectfully submitted,

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